#### IN THE SUPREME COURT OF MISSOURI

JOHN BECK,	)
<b>5</b> 44 <b>5</b> 5	)
Petitioner/Respondent,	)
	) Supreme Court No. SC86568
V.	)
ANN FLEMING,	
	)
Respondent/Appellant.	)

#### SUBSTITUTE BRIEF OF APPELLANT

Appeal from the Circuit Court of the County of St. Louis
State of Missouri
Honorable Joseph A. Goeke, III, Judge
(Judgment approving and adopting the Findings and Recommendations of the Family Court Commissioner, Honorable Victoria McKee)
Cause No. 563906

#### And

Missouri Court of Appeals Eastern District Division Three No. ED84457

#### KEEFE & BRODIE

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#### JURISDICTIONAL STATEMENT

This appeal is from a Family Court Judgment entered by the Honorable Joseph A. Goeke, III, Judge, Circuit Court of the County of St. Louis, State of Missouri on March 13, 2004, adopting and approving the Findings and Recommendations of the Family Court Commissioner, the Honorable Victoria McKee. Appellant (hereinafter referred to as "Wife") filed a Motion to Enforce the Decree of Dissolution of Marriage, and Respondent (hereinafter referred to as "Husband") filed a Motion to Dismiss the Motion to Enforce. The Motion to Dismiss was called, heard and submitted, and the Commissioner sustained Husband's motion. The Findings and Recommendations of the Commissioner were approved and adopted as the Judgment. Wife appealed said decision, and the Missouri Court of Appeals Eastern District reversed and remanded on November 9, 2004. A Motion for Rehearing and/or to Transfer to Supreme Court was denied by the Court of Appeals on January 26, 2005. Husband filed an Application to Transfer in this Court pursuant to Rule 83.04, stating that there was a general interest or importance of a question involved in the application of R.S.Mo. Sec. 516.350 and that *Holt v. Holt*, 635 S.W.2d 335 (Mo. 1982) should be reexamined. This Court, which has general appellate jurisdiction pursuant to Article V, Section III of the Missouri Constitution, sustained said application.

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#### **STATEMENT OF FACTS**

The parties were granted a Decree of Dissolution of Marriage on June 24, 1988. LF 160. The Decree incorporated a Marital Settlement and Separation Agreement executed by the parties, which awarded to Wife 12.5% percent of the proceeds from the sale of stock options received by Husband during the marriage as an employment benefit. LF 167. The options were to be exercised by Husband in the future, resulting in periodic payments to Wife from the proceeds upon each exercise and Husband's subsequent sale of said stock. LF 167, 185. Husband did in fact exercise a portion of the options, and he realized net proceeds from said options upon the sale of the stock in 1995, 1999 and again in 2001. LF 36-46. Husband made payments to Wife on the judgment on the following dates: February 15, 1995, January 7, 2000, and July 19, 2001. LF 22; 36-46. The first payment was made on the record of Boatmen's Bank on February 27, 1995, by the deposit of the check and recording thereof by the bank on Wife's bank statement. LF 46. All three payments were also recorded by Wife filing a Satisfaction of Judgment in the Circuit Court of St. Louis County on June 11, 2003 and again on July 8, 2003. LF 36-46.

On December 7, 2001, Wife filed a Motion to Enforce Decree of Dissolution of Marriage seeking the remaining funds due from the proceeds of the stock upon

exercise. LF 157. On December 11, 2001, Husband filed a Motion to Dismiss said motion on the basis that the judgment had not been revived pursuant to Sec. 516.350 R.S.Mo., and therefore it was not enforceable because there is a conclusive presumption that the judgment had been paid. LF 154. An Amended Motion to Enforce was filed by Wife on February 26, 2002, which was followed by an Amended Motion to Dismiss filed by Husband on March 4, 2003. LF 135; 83. Husband's Motion to Dismiss was overruled by Commissioner Victoria McKee on April 23, 2003, and on May 2, 2003, Husband then filed a Motion for Rehearing on said ruling. LF 66. On May 13, 2003, Judge Joseph Goeke, III entered an Order and Judgment in which he returned the commissioner's order for additional, specific recommendations and findings regarding payments made on the judgment and whether the judgment was made enforceable by Sec. 516.350 R.S.Mo. 2001. LF 49. After the cause was called for hearing, Commissioner McKee entered a Judgment on March 10, 2004, finding that pursuant to Sec. 516.350 R.S.Mo. 2001 a conclusive presumption exists that Husband had paid his obligations under the judgment, thereby dismissing Wife's Motion to Enforce. LF 19. Said judgment was adopted and approved as the court's judgment by Judge Goeke on March 13, 2004, and Appellant subsequently filed a Motion for rehearing on March 29, 2004, which was denied on April 20, 2004. LF 21; 15; 7.

Wife appealed said decision, and the Missouri Court of Appeals Eastern District reversed and remanded on November 9, 2004. A Motion for Rehearing and/or Transfer to Supreme Court was denied by the Court of Appeals on January 26, 2005. Husband filed an Application to Transfer in this Court pursuant to Rule 83.04, which was granted by this Court.

#### **POINTS RELIED ON**

I. THE TRIAL COURT MISINTERPRETED THE LAW BY FINDING
THAT THE JUDGMENT WAS PRESUMED PAID ON JUNE 24,
1998, AND FAILING TO APPLY THE EXCEPTION CONTAINED IN
SEC. 516.350 R.S.MO. (2001) BASED UPON SUBSECTION (3) OF
SAID STATUTE, BECAUSE THE JUDGMENT WAS NOT
ADJUDICATED TO HAVE LAPSED AND THEREFORE IT WAS
NOT PRESUMED PAID PURSUANT TO SUBSECTION (1) OF THE
STATUTE.

R.S.Mo. Sec. 516.350

*Holt v. Holt*, 635 S.W.2d 335 (Mo. 1982)

DeMoranville v. Tetreault, 654 S.W.2d 71 (Mo. en banc 1983)

Sanner v. Forbes, 651 S.W.2d 139 (Mo. en banc 1983)

*Pirtle v. Cook*, 956 S.W.2d 235, 245 (Mo. 1997)

Helfenbein v. Helfenbein, 871 S.W.2d 131 (Mo. App. E.D. 1994)

Spangler v. Spangler, 831 S.W.2d 256 (Mo.App. W.D. 1992)

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Wimmer v. Wimmer, 690 S.W.2d 475 (Mo. App. E.D. 1985)

Smith v. Atterbury, 270 S.W.2d 399 (Mo. en banc 1954)

II. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO (2001), REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THE COURT FAILED TO FOLLOW THIS COURT'S RULING AND ANALYSIS IN HOLT V. HOLT REGARDING THE DISTINCTIVE NATURE OF PERIODIC AND FUTURE PAYMENTS.

R.S.Mo. Sec. 516.350

Holt v. Holt, 635 S.W.2d 335 (Mo. 1982)

*Pirtle v. Cook*, 956 S.W.2d 235, 245 (Mo. 1997)

Lewis v. Gibbons, 80 S.W.3d 461 (Mo. En banc 2002)

III. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO. (2001) REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THAT VERSION OF THE STATUTE WAS IN EXISTENCE AT THE TIME THE ACTION WAS FILED, AND FAILURE TO APPLY A REMEDIAL STATUTE TO AN ACTION IN EXISTENCE AT THE TIME DENIES APPELLANT HER CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Loard v. Tri-State Motor Transit, 813 S.W.2d 71, 73 (Mo. App. 1991)

Dalba v. YMCA of Greater St. Louis, 69 S.W.3d 137 (Mo.App. E.D. 2002)

#### **ARGUMENT**

I. THE TRIAL COURT MISINTERPRETED THE LAW BY FINDING
THAT THE JUDGMENT WAS PRESUMED PAID ON JUNE 24,
1998, AND FAILING TO APPLY THE EXCEPTION CONTAINED IN
SEC. 516.350 R.S.MO. (2001) BASED UPON SUBSECTION (3) OF
SAID STATUTE, BECAUSE THE JUDGMENT WAS NOT
ADJUDICATED TO HAVE LAPSED AND THEREFORE IT WAS
NOT PRESUMED PAID PURSUANT TO SUBSECTION (1) OF THE
STATUTE.

Appellant's Motion to Enforce was filed on December 7, 2001, more than five months after R.S.Mo. Sec. 516.350 was amended on June 13, 2001. The amendment to the statute is found in Subsection 1, which added a specific exception as follows:

1. ...except for any judgment, order or decree...dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation, or annulment which mandates the making of payments over a period of time or payments in the future...".

Wife seeks enforcement of her Decree of Dissolution of Marriage, which awards her a portion of the proceeds from the exercise and sale of stock options awarded to Husband as an employment benefit during the marriage. The award by its nature mandates payments over a period of time and in the future. In order for Wife to obtain her award under the Decree, Husband would have to take action over some period of time after the Decree to not only exercise the options, but sell the stock and obtain the proceeds. The options expired at dates that occurred many years after the date of the Decree, and Husband did not sell the stock until 1995, 1999, and 2001. The judgment, and the provisions therein of which Wife seeks enforcement, are employment benefits that mandate a payment over a period of time and in the future. Therefore, said provisions fall within the exception found in Section 516.350.1 R.S.Mo. (2001).

The statute was also amended to provide Subsection (3), which states that such a payment is presumed paid, "...after the expiration of ten years after the payment is due...". In the present situation, the payments were not due until such time that Husband first exercised the stock options, and then sold the stock to acquire the proceeds, thereby mandating the payment to Wife of her 12.5% thereof. Husband sold the stock that was obtained from the exercise of some the options in 1995, 1999, and 2001, which is when the payments became due, and therefore the judgment is not presumed paid.

The trial court notes in its judgment that Subsection (3) of the amended statute also provided that, "This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001," and then goes on to find that the Judgment was presumed paid. However, the trial court's finding that the Judgment was presumed paid, apparently based on that statutory language, misapplies the controlling law on this issue found in *Holt v. Holt*, 635 S.W.2d 335 (Mo. 1982).

Holt deals with the first, nearly identical amendment to the statute, found in Subsection 1, which added a specific exception for any judgment, order or decree awarding child support or maintenance. A further amendment to the statute at the same time, found in Subsection (2), also provided that, "This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 31, 1982." This Court decided in Holt that the judgment had not been "adjudicated to have lapsed" and therefore the exception should be applied to that case and afford the litigant the benefit of the new law. This Court applied the amendment retroactively, which found that a judgment which previously would have been "presumed paid" over two years prior to the enactment of the new statute was now enforceable. This court reasoned, "In light of the Missouri General Assembly's passage... of Senate

Bill 486...the Court is of the view that the appropriate course is to afford appellant the benefit of the new law. In this way there will be a consistent and uniform guide for courts when adjudicating similar cases." *Holt*, at 338.

This Court upheld *Holt* twice in the year following the decision, finding that even though a judgment was over ten years old, the amendment should be applied to judgments which were in litigation, or had not yet been litigated, on the issue of whether it was "presumed paid" pursuant to the statute. DeMoranville v. Tetreault, 654 S.W.2d 71 (Mo. en banc 1983); Sanner v. Forbes, 651 S.W.2d 139 (Mo. en banc 1983). This Court again upheld its ruling in Holt by stating that, "Holt concluded that the statutory exception for child support and alimony, which stated that the limitation period ran for each periodic payment when it became due, applied retroactively." Pirtle v. Cook, 956 S.W.2d 235, 245 (Mo. en banc 1997). The retroactive application of the amendment at issue in *Holt*, and specifically the finding that judgments which have not been adjudicated to have lapsed are not presumed paid within the meaning of the last sentence of Subsection 2, has also been discussed and upheld by all three appellate districts of this State. Helfenbein v. Helfenbein, 871 S.W.2d 131 (Mo. App. E.D. 1994); Spangler v. Spangler, 831 S.W.2d 256 (Mo.App. W.D. 1992); Sparks v. Trantham, 814 S.W.2d 621 (Mo. App. S.D. 1991); Coleman v. Coleman, 823 S.W.2d 6 (Mo. App. E.D. 1991); and Wimmer v. Wimmer, 690 S.W.2d 475 (Mo. App. E.D. 1985). It is clearly the

definitive statement of Missouri law that the new limitations period should apply not only to payments due after the effective date of the statute, but also to payments due prior to that date as well. Current or future litigants seeking to enforce a judgment based upon the exception should be afforded the benefit of the new law so that there will be a consistent and uniform guide when adjudicating similar cases.

It is not by mistake that the legislature used identical language when amending the statute in 2001. By the language found in Subsection 3, the legislature could only have meant that there should be retroactive application of the amendment, and that judgments which have not been adjudicated to have lapsed are not presumed paid within the meaning of the last sentence of Subsection 3. Where the legislature reincorporates exact language in a statute after said language has received settled judicial construction by a court of last resort, it must be presumed that the legislature knew of and adopted such construction. Smith v. Atterbury, 270 S.W.2d 399 (Mo. en banc 1954). Therefore, it must be assumed that the legislature knew of and adopted this Court's interpretation of the last sentence of Subsection 2, and that they intended the same effect with the amendment in 2001 and the last sentence of Subsection 3. Such a result affords current and future litigants the benefit of the new statute, but will not resurrect judgments which have already been adjudicated to have lapsed. The present judgment was not adjudicated to have

lapsed, and Wife's Motion to Enforce was filed *after* the 2001 amendment. Therefore, the judgment was not presumed paid on June 24, 1998, and Husband's Motion to Dismiss should be denied because Wife is still entitled to enforcement of the Judgment.

The ability of a litigant attempting to enforce a judgment over ten years old to benefit from an amendment to R.S.Mo. Sec. 516.350 is consistent with principles of equal protection under the law. Those litigants who seek to enforce a judgment pursuant to the amended statute should have the same protection under the law regardless of when the judgment was issued. If a judgment is adjudicated to have lapsed prior to the amendment, then it is appropriate that the judgment debtor be able to rely on that adjudication. The litigant seeking to enforce the judgment chose a particular time to bring the litigation before the court, and had an opportunity to use all legal avenues available at that time. That litigant should not get a second bite at the apple. However, if neither party chose to litigate the issue, then the party seeking to enforce the judgment should have equal protection under the law, which will include having an opportunity to use the same legal avenues as litigants seeking to enforce judgments which may have lapsed after the effective date of the statute. Therefore, Wife should be afforded the opportunity to use the law in existence at the time she brought her action, and Husband's Motion to Dismiss should be denied.

II. THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION FOUND IN SEC. 516.350 R.S.MO (2001), REGARDING JUDGMENTS DIVIDING EMPLOYEE BENEFITS IN CONNECTION WITH A DISSOLUTION OF MARRIAGE, BECAUSE THE COURT FAILED TO FOLLOW THIS COURT'S RULING AND ANALYSIS IN HOLT V. HOLT REGARDING THE DISTINCTIVE NATURE OF PERIODIC AND FUTURE PAYMENTS.

The applicability of R.S.Mo. Sec. 516.350 to periodic and future support payments was addressed by the Supreme Court in *Holt v. Holt*, 635 S.W.2d 335 (Mo. 1982). In *Holt*, the trial court quashed Wife's garnishment on Husband's wages for child support payments due on a judgment over ten years old. The trial court found that, since the judgment had not been revived and payments had not been made on the judgment, the provisions of Section 516.350 R.S.Mo. prevented enforcement of the judgment. This Court disagreed, specifically stating that it must recognize the peculiar nature of future periodic payments and the fact that they are categorically different from sum certain money judgments then due and owing. *Holt*, at 337. Unlike other judgments, these payments look toward the future and it is not known at the time of the decree the amount of the future installment payments. The payments are subject to contingencies and even termination. As a

result, the former spouse cannot execute on the judgment and presently collect future periodic payments. *Id.* at 337. In light of the above analysis, and the recent change that had just occurred in the statute to remedy the problem, this Court applied the statute and found that the judgment had not been presumed paid.

The present situation is analogous to *Holt* in all respects. First, the judgment at issue is for the periodic payments on stock options that will be paid to Wife in the future upon Husband's sale of the stock. The options expired at different times in the future, making it inevitable that the proceeds would be obtained and paid over different periods of time in the future. In addition, Husband had the option of exercising and selling the stock at different times. The price of the stock would be unknown and the proceeds obtained therefrom, if any, would be uncertain and subject to contingencies. Therefore, Wife could not execute on the judgment and collect her payments within the ten years prescribed by the statute.

In fact, Husband in the instant case did not sell some of the stock until 1999 and 2001, and even paid Wife money under the 1988 judgment pursuant to those sales. If Husband is allowed to claim that the judgment is presumed paid after ten years, then he could easily defraud Wife of all money due her under the stock option portion of the judgment by waiting until ten years after the date of the judgment to sell the stock. Not only would he receive a windfall due to the statute, he would actually have incentive to wait until well after the judgment was deemed

to expire because the stock price would likely rise and the windfall would be greater. Wife would effectively be denied her vested right to the property because she would have no legal remedy with which to enforce the judgment. The injustice in this result is the very reason that the legislature amended the statute in 2001.

The primary rule of statutory construction is to ascertain the intent of the legislature and to give effect to the intent if possible. *Lewis v. Gibbons*, 80 S.W.3d 461 (Mo. En banc 2002). The intent of the legislature in amending the statute in 1982 to allow for the enforcement of periodic support payments beyond ten years from the judgment was to remedy the unfairness caused by the limitation imposed by the statute. This Court in *Holt* found that the uniqueness of the periodic payments and the unfairness of the statute's limitation on such payments called for a retroactive application of the amendment to judgments which had not been adjudicated to have lapsed. In the present case, this Court should uphold its ruling in *Holt* by finding that the uniqueness of certain employment benefits found in divorce decrees, such as the stock options in the instant case, and the unfairness of the statute's limitation on such payments, calls for a retroactive application of the new amendment to judgments which have not been adjudicated to have lapsed.

The holding in *Holt* was again addressed by this Court in *Pirtle v. Cook*, 956 S.W.2d 235, 245 (Mo. 1997), where it again acknowledged the uniqueness of periodic payments in the future. This Court failed to apply *Holt* simply because the

judgment at issue was a single, sum certain payment of \$40,000.00, which the court thought to be more consistent with the plain meaning of the statute in existence at the time than the holding in *Holt*. *Id*. at 245. As in *Holt*, the payments in the present case are unique, periodic, and of the exact peculiar nature that was addressed in *Holt* and remedied by the legislature in 2001. Logic and fairness warrant that the court's analysis in *Holt* should be upheld, and in light of the fact that the statute was amended after Wife brought her suit, Husband's Motion to Dismiss should be denied.

THE COURT ERRED IN FAILING TO APPLY THE EXCEPTION III. **FOUND** IN SEC. 516.350 R.S.MO. (2001),REGARDING **JUDGMENTS DIVIDING EMPLOYEE BENEFITS** IN CONNECTION WITH A DISSOLUTION MARRIAGE, **OF** BECAUSE THAT VERSION OF THE STATUTE WAS IN EXISTENCE AT THE TIME THE ACTION WAS FILED, AND FAILURE TO APPLY A REMEDIAL STATUTE TO AN ACTION IN EXISTENCE  $\mathbf{AT}$ THE TIME DENIES APPELLANT CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

In addition to the well settled state of the law outlined above regarding the applicability of Sec. 516.350 R.S.Mo and the intent of the legislature to make the statute retroactive, the law is also well settled that a statute dealing only with procedure or remedy may constitutionally apply to causes of action existing at the time it was enacted. *Loard v. Tri-State Motor Transit*, 813 S.W.2d 71, 73 (Mo. App. 1991). In *Loard*, the Court discussed a different statute of limitations, and inquired into the result of the amendment and what the legislature intended. The Court found that a new provision in the statute which operated to toll the time limitation was meant to establish a legally acceptable excuse for not applying the existing period of limitation, and therefore it affects the remedy, not the basis for

the claim. As in *Loard*, the new provision in R.S.Mo. Sec. 516.350 provides a legally acceptable excuse for not applying the existing period of limitation with respect to employee benefits which mandate payment in the future. Therefore, since the provision is procedural or remedial, not substantive, the statute in existence at the time must be applied. Failure to apply the statute in existence at the time that Wife's action was filed will deny her due process of law which would otherwise provide her a remedy to recover property to which she would be entitled. Such a result would violate Wife's constitutional rights.

A statute may be applied retroactively if: (1) the legislature clearly expresses its intent that it be given retroactive application in the express language of the act or by necessary or unavoidable implication; and (2) the statue is merely procedural or remedial, and not substantive, in its operation. *Dalba v. YMCA of Greater St. Louis*, 69 S.W.3d 137 (Mo.App. E.D. 2002). As discussed above, it is clear that the legislature intended that the amendment to the statute be retroactive considering the substantial history and legal precedent regarding that issue with this particular statute. In addition, the amendment is not substantive because it does not take away or impair a vested right acquired under existing laws, nor does it create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed. *Id.* at 140.

The amendments to R.S.Mo. Sec. 516.350 do quite the opposite. The effect of the amendments is to protect an already existing vested right, obligation, or duty by ensuring that it can be enforced under certain circumstances. Therefore, the provisions at issue in R.S.Mo. Sec. 516.350 are remedial in nature, and they should be applied retroactively to allow Wife to bring her cause of action.

The usual result of a presumption of payment statute may be to wipe out a debt and extinguish the right of action, but this result does not mean that it was the intent of the legislature to simply wipe out all judgments over ten years old. At the very least, that is not the intent with the recent versions of the statute as it has been amended on two occasions to provide for significant exceptions, one of which is applicable to this case. The exceptions found in the statute are clearly intended to be remedial because they provide an avenue for enforcement of a judgment even after ten years has passed from the time of its rendition. The exceptions lift the restraint placed on a right of action by the statute for the purpose of allowing recovery in particular situations, and therefore they are concerned with the remedy. In fact, the exceptions do not extinguish the right of action, but were included for the specific purpose of lifting the bar on recovery so that the right of action may be pursued, which was the obvious intent of the legislature. Therefore, the current version of R.S.Mo. Sec. 516.350 should be applied to the present situation and operate to allow Wife to pursue her action for enforcement of the judgment.

#### CONCLUSION

The trial court's judgment sustaining Husband's Motion to Dismiss misapplies and misinterprets the law by finding that the judgment is presumed paid pursuant to Sec. 516.350 R.S.Mo. 2001. The language in the version of the statute which existed at the time the action was filed provides an exception for employment benefits mandating periodic payments in the future, and provides that with respect to such a judgment, it is not presumed paid until ten years after the payment becomes due. That language, as applied to the facts of the present situation, must lead to the conclusion that the judgment is not presumed paid because the payments on the stock option exercise did not become due until Husband sold the stock, which was in 1995,1999, and 2001.

As held by this Court in *Holt v. Holt*, the amended statute should apply to all cases which have not been adjudicated to have lapsed. The provision in the statue which states that amended language should take affect only as to judgments which are not presumed paid as of a certain date, has been specifically interpreted by Missouri courts, including this Court, to mean that judgments which have not been adjudicated to have lapsed are not presumed paid within the meaning of the provision of the statute. The legislature used identical language in the most recent amendment, knowing the long standing construction thereof by the courts.

Therefore, Wife should have the benefit of the statute as the judgment at issue has not been adjudicated to have lapsed.

Judgments dividing employment benefits which mandate periodic payments in the future are unique in nature because they are not sum certain judgments known and collectible at the time of the judgment. As a result, they should be treated differently under Sec. 516.350 R.S.Mo., just as support payments were treated differently under *Holt*. In addition, any exceptions contained therein should be applied to cases filed at the time the statute is in existence so that all litigants will have equal protection under the law. Failure to apply the remedial amendment to the statute in existence at the time the action was filed denies Wife her constitutional right to due process of law. Therefore, Wife should be entitled to pursue her Motion to Enforce, and Husband's Motion to Dismiss should be dismissed.

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